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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS

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1. In its motion to dismiss, Appellee places great weight on the contention that Appellant had agreed that the disputed area be certificated to Appellee. For example, Appellee stated (Motion, p. 47) that "* * * Appellant unequivocably agreed that the (disputed) area should be certificated to Appellee * * *." With deference, such statements, made repeatedly (Motion, pp. 11, 24, 26), misstate the nature of the actual agreement.

The agreement of August 12, 1958, to which Appellee refers, specifically provides in pertinent part as follows (R. 1556-1557):

> "3. No agreement has been reached with respect to customers served or areas claimed by Association in the corporate limits of Utica, Clinton and Flowood, *nor is there any understanding in regard to the rights of either party within any area upon its future incorporation in the corporate limits of any municipality. This memo of understanding shall not prejudice the rights that either party may have with respect to such area.*
>
> "4. The area agreement contained herein simply provides that neither party will object to areas being assigned by the Public Service Commission in conformity herewith. It does not attempt to define the legal status of the areas. *Other than as herein set out,* neither party waives any rights accruing to it from the Public Utilities Act of 1956, *from a franchise* or from any other legal source. * * *." (Emphasis is ours, unless noted.)

Thus, it is clear that the agreement of 1958 in no way resolves the issue presented in this case. To the contrary, the paragraphs of the agreement quoted above make plain that Appellant entered into no agreement with respect to the effect of annexation by the City of Jackson or with respect to rights which might be held to stem from the franchises. The effect of annexation and the subsisting validity of the legislative franchises held by Appellant are precisely the matters which are here in issue.

2. At several points in its argument (Motion, pp. 10, 11, 19, 25), Appellee also suggests that Appellant had never served the area in dispute. Appellant was bound by contract to serve the "city of Jackson" and has expanded its service to meet its expanding boundaries over the years. As of the date of the last city expansion, March 17, 1960,

Appellant was the sole supplier serving the entire City of Jackson as it then existed (Vol. VIII, R. 983). The record is clear that, when the City of Jackson expanded to annex the disputed area in 1960, Appellant likewise expanded its service to serve the disputed area (Finding 15, p. A28 of Order, Vol. XI, R. 1602). In fact, the Commission found that Appellant, unless ordered to cease and desist would continue to offer to serve the disputed area (Finding 16, pp. A29-A30 of Order, Vol. XI, R. 1604). Thus, it is clear that Appellant did not intend to abandon the area in dispute, especially after annexation in 1960. How can it be claimed that Appellant abandoned prior to 1960 its right to serve an area that was then not even within the "city of Jackson" so as to be within its franchised area? It must not be overlooked that Appellant has two franchises[1]: one covering "the city of Jackson and its suburbs" (Vol. V, R. 630) but the other covering "the city of Jackson" only (Vol. V, R. 628). Even as to the suburban franchise, if the disputed area was not a suburb in 1888, there was no real demand for service in the disputed area—three shacks and a farmhouse, with a dirt road—until Highway 80 was opened in about 1940 (Motion, pp. 11-13); and Appellant had installed six services in the disputed area by 1956 (Vol. VII, R. 836). Note that these charter franchises were "* * * the only franchises * * *" specifically covering the City of Jackson and its suburbs claimed by Appellant from 1944 until March 29, 1956 (Vol. X, R. 1446) and that these franchises were relied on in a prospectus filed with the Securities & Exchange Commission in 1944, under which bonds are still outstanding (Ex. 49, Vol. X, R. 1459). Thus as a matter of plain fact, Appellant has not abandoned but, rather, has asserted and exercised its

1. Under state law, Appellant had the right to have several, independent franchises. *Southern Bell Tel. & Tel. Co. v. Meridian*, 241 Miss. 678, 131 So.2d 666, 674 (1961).

right to serve the disputed area. The abandonment argument of the court below runs counter to the ultimate finding on which the Commission based its cease and desist order: the Appellant's willingness to serve in the disputed area.

3. Appellee claims (Motion, p. 29) that the decision of the Supreme Court of Mississippi in interpreting the charter franchises establishes a rule of decision binding on this Court; but, with deference, this is not the rule where the state statute impairs the obligation of a contractual franchise. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1941); *Russell v. Sebastian*, 233 U.S. 195, 202 (1914).

4. Appellee raises an argument not considered or ruled upon by the Commission or the courts below. Appellee argues that the action of the Commission, affirmed by the courts below, must be viewed as a valid exercise of police power.

The Commission did not find that the police power of the state required that appellant's contracts be impaired. To the contrary, the Commission specifically refused to consider the validity of the contracts at all (Order, pp. A30-A31; Vol. XI, R. 1605). Similarly, the courts below made no finding with respect to police power.[2] Thus, appellant submits that the result below cannot here be justified as having been grounded on police power considerations.

In any event, the argument lacks force in the circumstances of this case. Appellee quotes from the case of *Delta Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 482, 149 So.2d 504 (1963). The

2. Appellee recognized this in its Summary of Argument, since it presented the police power argument separately from those which it contended were approved by the Supreme Court of Mississippi (Appellee's Br., pp. 47-48).

court in that case held that a *municipality* lacked the power to grant a franchise in an area not yet a part of the municipality. Thus, the issuance of a grandfather certificate covering an area not yet annexed by the municipality was held to be a valid exercise of the police power, since the only franchise involved was a *municipal* franchise, and therefore there were no "preexisting rights as to the area involved * * *." 149 So.2d at 514. Putting to one side the fact that *Delta* specifically dealt with the police power point, that decision is not controlling in the instant case, since appellant's franchises are *state* franchises. The distinction between state and municipal power is critical to the issue in this case.

It is well established that state legislation may be considered a binding contract under appropriate circumstances. As this court explained in *Indiana, ex. rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938):

> "* * * The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10. If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature. * * *".

A franchise granted by a state to a public utility is such a contract, and such a grant has been held not to be contrary to the police power of the state. *New Orleans Gas Light Company* v. *Louisiana Light and Heat Producing and Manufacturing Company*, 115 U.S. 650 (1885). In

fact, this Court found that *the exclusiveness* of a franchise granted to the gas company "* * * has no relation whatever to the public health, or to the public safety." 115 U.S. at 672. The Court said that, while the state could regulate the Gas Company if the manufacture of gas became "* * * injurious to the public health, the public comfort, or the public safety * * *", * * * "[i]t cannot be said with propriety that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety." 115 U.S. at 672. The courts have made a distinction between the cancellation of a franchise, as has been done with appellant's franchise in the disputed area, and the regulating of the grantee of the franchise. *State of Tennessee* v. *United States*, 256 F.2d 244 (1958).

The case of *Grand Trunk Western Railway Company* v. *City of South Bend*, 227 U.S. 544 (1912), illustrates this distinction. *Grand Trunk Western Railway* was granted a charter by the State of Indiana. The city of South Bend passed an ordinance granting the company the right to construct its railroad through the streets of the city, which included permission to construct double tracks along a certain street. The railroad initially constructed such double tracks along approximately one-half the permitted area. Twenty years after the first double track was constructed, the railroad began to extend the double track along the remainder of the permitted area. South Bend then repealed its original ordinance insofar as it granted the right to construct a double track. The city, noting the great increase in its population, claimed that its action was a proper exercise of the police power. This Court did not find that the repeal of the ordinance was necessary, and held that the facts did not show "* * * that the repeal was the reasonable exercise of the police power, but on the contrary showed that the contract of 1868 was materially

impaired by the ordinance of 1901 in violation of Art. I, § 10 of the Constitution." 227 U.S. at 558. The Court explained, at 227 U.S. at 554:

> "* * * the inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is inseparably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated, because of the very growth in population and business the railroad was intended to secure."

Furthermore, even if police power were a valid issue in this case, it is nevertheless subject to supervision of this Court:

> "* * To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. * * *" *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

It is obvious that not all state action can be considered proper exercise of the police power. If any state action could be justified as an exercise of the police power, the state could simply by so acting impair any contract. This would render the protections of Art. I, § 10 of the Constitution worthless. If legislation is to be justified as proper exercise of the police power, especially when it abridges

constitutional rights there must be a showing that such action is necessary for the public good. No such showing has been made in this case.

> "* * * Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance." *Butler v. Little Rock*, 361 U.S. 516, 525 (1960).

The public is not being denied service. The only issue is whether Appellee can be given the privilege of furnishing exclusive service, with a resulting impairment of Appellant's franchise. And this issue was resolved below without any consideration of the question whether the grant of an exclusive franchise to Appellee was necessitated by the demands of the public good.

It must be kept in mind that Appellant serves the entire City of Jackson exclusively, except for the disputed area, a tiny island (Vol. IX R. 1429). What is the merit in requiring the street lighting of the City to be split into two systems? There is an obvious benefit in having one unified system and the City of Jackson had chosen Appellant to perform this service. (Findings Nos. 7, 8 and 9, p. A-26 Jurisdictional Statement.)

In *Indiana, ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), a teacher who achieved "permanent" status under the Indiana Teachers' Tenure Act of 1927, had her employment terminated after this statute was amended in 1933. The amendment permitted such termination without regard to the conditions and limitations of the earlier act. The teacher argued that she had a vested property right in her indefinite contract under the 1927 Act and that this could not constitutionally be impaired by repeal of the statute. The state argued that every contract was subject to the police power of the state, and that the legislature

had validly exercised that reserved power when it repealed the Teachers' Tenure Act. This Court found that the police power had not been properly exercised in that case because there was no showing of public need.

5. Appellee makes certain policy arguments to support its interpretation of the Act. Appellee argues that, if the appellant's franchise is upheld, any municipality, by annexation, could invalidate certificates granted by the Commission. However, this exaggerates appellant's position. Appellant does not argue that appellee's grandfather certificate is now invalid. Rather, appellant simply argues that under its franchises, it now has joint rights with appellee in the disputed area. Thus, the validity of the grandfather certificate is not affected - only its exclusiveness.

Recognizing that only exclusivity is here involved, appellee points to the preamble of the Act which contains an expression of policy against unnecessary duplication. Concededly, the Act does caution against action by the Commission which would result in unnecessary duplication. But this statutory guideline has not been interpreted by the Commission as overriding the protection of existing contract rights. To the contrary, the Commission has followed the policy of protecting existing rights even where such protection results in some duplication in service. Thus, when one utility has services within the grandfather certificate area of another, the Commission has not held that the rights to such existing services must be lost but has, instead, ruled that such services can remain in the area certificated to the other utility (Order, at App. 28).

In short, the statutory caution against unnecessary duplication has no application where the issue, as here, is whether there are existing franchise or contractual rights. If such rights exist, and appellant submits that they do

here exist, they must be respected and enforced unless the Commission finds - no such finding has here been made - that they must be abrogated for the public good.

The Public Service Commission Act of Mississippi itself provides in Section 7716-39, *Recompiled Mississippi Code of 1942*, thereof the following:

> "Repeal of conflicting acts. - Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or *any rights accruing, accrued or established* prior to the effective date of this act."

In conclusion, we respectfully call to the Court's attention that this Court has already rejected the attempt of a state to impair a valid franchise by passing legislation such as the Public Service Commission Act of Mississippi (Sections 7716-01 et seq., *Recompiled Mississippi Code of 1942*) and requiring a utility to accept a certificate of public convenience and necessity - - - in that case, called an "indeterminate permit" - - - in lieu of its pre-existing franchise. In *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 134, 137 (1923), this Court declared:

> "Considering the opinions of this Court, it seems clear enough that a valid contract resulted from the dealings between the city of Superior and plaintiff in error, whereby each became obligated to do certain specified things."
>
> * * *
>
> "The integrity of contracts - - - matter of high public concern - - - is guaranteed against action like that here disclosed by Section 10, Art. 1, of the Federal Constitution. 'No state shall - - - pass any - - - law impairing the obligation of contracts.' It was beyond

the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract."

Since the appellant is bound to serve in the disputed area, the State is bound to let it serve.

We, therefore, respectfully submit that this Court should overrule the Motion to Dismiss Appeal filed herein and should exercise its jurisdiction to correct the serious errors apparent in the record.

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CERTIFICATE OF SERVICE

I, Joshua Green, one of the attorneys for the Appellant herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Response to Motion to Dismiss Appeal on the Appellee in the manner following:

By mailing two copies thereof in a duly addressed envelope, with postage prepaid, to T. Harvey Hedgepeth, Esquire, Deposit Guaranty National Bank Building, Jackson, Mississippi 39201; and Goza, Case & Montgomery, Canton, Mississippi 39046.

I further certify that I have caused to be mailed postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D. C. 20520.

This, the 28th day of October, 1969.

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